No. 12703.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

Appellee.

REPLY BRIEF OF UNION PACKING COMPANY

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Introductory Statement.

Appellee's brief confirms our principal contention that an asserted oral contract so controversial and indeterminate in character, should not be enforced in disregard of the Statute of Frauds. When the Trial Court stated:

> "This is probably the *closest* case I have had to decide since I have been on the bench." [R. 123.]

he was referring to the difficulty in evolving a contract out of the negotiations in the record. He had no difficulty with respect to the Statute of Frauds. He stated that automatically it became inapplicable if he found an oral contract was made. But he confessed the utmost difficulty in adducing such oral contract.

He refused to accept the plaintiff's contention that a contract was made as alleged in the complaint [R. 3] but found only a "continuing offer" which was accepted by delivering the cattle. Appellee has abandoned the case made by the complaint and now asserts that the negotiations

of September 8 and 10, alleged in the complaint to constitute "an oral contract" [R. 3], were merely a continuing offer which plaintiff accepted in October "by so delivering 248 head" (Appellee's Brief, p. 19).

Thus the very act which it is alleged constitutes the acceptance of the offer is also the act which is claimed to take the contract out of the Statute. There is of course no authority cited for such a monstrous legal theory.

On the defense of the Statute of Frauds the appellee's position is simply that the application of the Statute is a matter of discretion, not subject to review on appeal. This position is equally vicious. Whether the Statute has been satisfied depends on the application of legal principles. It is a question of law. The trial court recognized this when he stated:

> *"If I am wrong on the law, you have your remedy of appeal."* [R. 128.]

Assuming that the application of the Statute is a matter of discretion, it is clear that the trial court exercised no legal discretion, but simply remitted defendant to its remedy on appeal as upon a question of law. [R. 128.] At the same time he stated that he would not follow the decision of this court in *Wood v. Moore,* 97 F. 2d 920:

> "With all due respect to my superior, Judge Stephens, *I do not think that is the law. I think that goes too far."*

Accordingly, the decision cannot be sustained on the plea of an exercise of judicial discretion in accordance with legal principles, in disregarding the Statute of Frauds.

The foregoing considerations dispose of the principal points made by appellee. These will now be taken up in detail.

ARGUMENT.

I.

There Was No Proof of the Oral Contract Alleged. There Was No Contract in Writing, and No Satisfactory Proof of an Oral Contract.

The complaint alleged "on or about the 10th day of September, 1948, plaintiff and defendant entered into an oral contract . . ." [R. 3.] No other contract was alleged. When there was a failure of proof on this issue, the trial court suggested on the hearing of the motion for nonsuit.

> "From the standpoint of what is the plaintiff's strongest position, you have Mr. Miller making an offer. It is a continuing offer until it is revoked. Certainly it would continue for a reasonable time." [R. 102.]

This idea of a continuing offer on September 8th, reaffirmed on September 10th, and accepted by delivery to defendant is carried into the findings and is asserted many times in appellee's brief (pp. 4, 14, 19, 37):

> "defendant had made a continuing offer to purchase approximately 250 head of cattle delivered in Los Angeles for a stated price and that the plaintiff had accepted such offer by delivering 248 head" (p. 4).
>
> "The delivery of these cattle in Los Angeles consigned to defendant constituted an acceptance of the offer and as a result a contract was created between the parties" (p. 14).
>
> "Accordingly, defendant having made a continuing offer to purchase from plaintiff for a stated price approximately 250 head of cattle to be delivered to it in Los Angeles and plaintiff having accepted such offer by so delivering 248 head, there was an agreement between the parties" (p. 19).

Appellee therefore has abandoned entirely the contract sued upon—*i.e.,* the alleged oral contract of September 10, 1948 [R. 3]. It relies entirely upon the theory of a continuing offer accepted by performance on its part, *i. e.,* by delivering the cattle in Los Angeles four weeks later.

The very suggestion of such a continuing offer to remain in effect in a fluctuating market for such a long period is so preposterous that it calls for the clearest proof. No such proof exists.

Appellee first refers briefly to the conversations of September 8th and 10th (p. 11). This reference is incomplete and will be found at length in Appellant's Opening Brief, pages 10-11. But in the portions quoted by appellee will be found defendant's offer stating:

> "*Send them on down.*
>
> "You tell Swanson to *send them on down.*" (pp. 11, 12).

Certainly this does not amount to an offer to continue in effect three or four weeks. Nothing whatsoever appears to support the holding that there was a continuing offer. It would be folly to suppose that a responsible concern would do business in that way, yet on such nebulous supposition an oral contract is enforced, in violation of the Statute of Frauds to pay more than $70,000 as the purchase price of cattle delivered on October 7th, a full four weeks later (Appellee's Brief, p. 13).

Appellee then refers to the telephone conversation of September 24-28 between Swanson and Miller, defendant's officer (p. 13). The reliance is upon the witness Jaffe, an officer of plaintiff, who stated he stood near the phone and heard Miller say "he had a deal." This testimony is not sufficient to show a continuing offer by Miller.

In the first place Swanson positively denied any such statement was made.

> "The Court: *Do you remember him saying anything about he had a deal?*
>
> The Witness: *No, we didn't discuss that on the telephone.*"

This was the testimony of the party representing plaintiff, who was doing the talking on the phone, and by whose testimony plaintiff was bound.

Also it is difficult to recognize the asserted admission by Miller that he had a deal, with the court's finding that defendant a few days later denied the existence of a contract because the market had dropped. Again the court itself finds no support in the record for the plaintiff's original contention that there was a contract at this time. He expressly finds there was not [R. 102] and that there was only a continuing offer.

How then can Jaffe's testimony be held to establish a contract? Certainly none was found.

Reference is then made to the telegram of Swanson to Miller on September 28:

> "Ten cars leaving noon today *flying down see you tomorrow*" (p. 14).

But this telegram is more consistent with the absence of a contract than with the existence of one, else why the necessity of flying down to see Miller immediately, when the cattle would not arrive for ten days. In any event no contract is found to exist by reason of such telegram.

Appellee next refers to the "inaction" of Miller on receipt of the telegram (p. 14). But the wire had said that Swanson would be in Los Angeles "tomorrow." There was nothing Miller could do except try to reach him by telephone as he did. The "inaction" instead of constituting "evidence that he believed there was an agreement" (p. 15), is rather *evidence that he did not so believe* and had no idea one was asserted. At any rate it is not found that the telegram constituted a contract. It is equally clear that it did not constitute a contract, but only an arrangement for negotiations.

It is next asserted (p. 15) that the custom in the business to consign to the buyer makes such consignment evidence of an agreement. No cases are cited. It is elemental that custom cannot *create* a contract or evidence the existence of one. It is important only on the matter of interpretation of contract terms. There is no finding that such custom evidenced contract. If such a finding were made it would be clearly erroneous.

It is asserted that appellant's assistance in disposing of the cattle in Los Angeles and its willingness to pay a premium of ½¢ per pound above the highest offer obtained by the Commission Company is "evidence that Mr. Miller knew that he had an agreement for their purchase" (pp. 16-17).

But it is undisputed that as soon as Swanson arrived in Los Angeles and at their very first meeting Miller unequivocally denied the existence of an agreement [R. 13],

and has denied it all times thereafter. Appellant also refused to accept delivery [Finding XVII, R. 13-14]. There was no occasion for Miller "to blow his top" (p. 17).

Admittedly defendant's officer was an old friend of Swanson. Defendant cannot reasonably be penalized under these circumstances for assisting Swanson in disposing of the cattle or for paying a premium over the highest price otherwise obtainable by the Commission Company. Such conduct can furnish no legal support for inferring a contract which did not theretofore exist and which even the trial court found did not exist prior to delivery of the cattle in Los Angeles.

If appellant's officer changed his mind about the desirability of the purchase at any time prior to October 7 when the cattle were delivered in Los Angeles he had the legal right to withdraw any offer to purchase. That he did not do so is merely evidence that no such offer existed. Proof that the offer was made and was left open and was accepted in accordance with its terms would be necessary to show a contract. This lack of proof cannot be supplied by custom, assistance in diversion or a consideration of whether the purchase price paid to a third party for the cattle was more than someone else offered.

The reference to the appellant's records as showing four lots of the cattle with the identical percentage of dressed weight is entirely pointless, as the records are not challenged (p. 17).

Nothing else is suggested in support of the contract except the assertion that appellant repudiated the contract (1) because there was a drop in the market, and (2) because there was a cancellation of government contracts (pp. 22-25).

(1) The Drop in the Market.

The market decline is more truly evidence of a fictitious claim on the part of plaintiff, than it is of repudiation of contract by appellant. It was plaintiff who was thus motivated to falsely assert a prior contract at a fixed higher price. Appellant did not need to wait until the cattle arrived and then repudiate. It would have been free under the court's findings to withdraw its offer at any time prior to October 7. The obvious principle which must control this issue is that proof of motive will not supply evidence of the contract (Op. Br. p. 14).

(2) The Cancellation of Government Contracts.

Whether the government contracts were cancelled or not, Canadian cattle could not be used to fill such contracts under the Statute. That appellant was not oversupplied with cattle is obvious, for it did purchase the entire lot of plaintiff's cattle and use them. They constituted only about one day's regular kill [R. 87].

The evidence therefore on plaintiff's own theory is equivocal and far from convincing. It is only by distorting stray portions of testimony and by ascribing fraudulent motives, contrary to the statutory requirement that

honest dealing is to be presumed, that even a glimmer of support is adduced to plaintiffs' self-contradictory and self-impeached thesis.

The case as presented in our opening brief (pp. 1 to 3, and 9 to 18) is not challenged by appellee. Upon re-reading this portion the court must conclude that no binding contract was established. That the theory of continuing offer—as propounded by the trial court—in direct opposition to the plaintiff's pleadings, is unsupportable, and cannot be reconciled with the plaintiff's own evidence (1) that appellant on September 10 asked that the cattle be shipped immediately—not three or four weeks later; (2) that in the September 24-28 phone conversations appellee suggested that an attempt be made to sell the cattle in Canada; (3) that such attempts were actually made not only prior to shipment but during the course of transit; (4) in notifying the appellant of the shipping of the cattle plaintiff's agent said he was flying down to see appellant's officer next day and then consented to the diversion of the cattle to the Southwest Commission Company.

It is for the purpose of preventing such controversies coming to court that the Statute of Frauds was enacted. The flimsy and self-contradictory character of plaintiff's own evidence requires that the court consider carefully whether the situation measures up to that required of contracts which do not comply with the statute.

As stated in *Hamby v. Wise,* 181 Cal. 286, 289, there must be "evidence just as good as a writing of the agreement between the parties." Certainly that is not this

case. And in *Seymour v. Oelrichs,* 156 Cal. 782, 795, relied upon by appellee, the court adopts the rule of Browne on Statute of Frauds:

> "A plaintiff—must be able to show clearly—*not only the terms of the contract,* . . ."

Here the trial court confessed that plaintiff's showing was unsatisfactory.

Purcell v. Miner, 4 Wall. 513, 517, 18 L. Ed. 435.

> "A mere breach of a parol promise will not make a case for the interference of a chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him. He knows that the law requires written evidence of such contracts, in order to show their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for him, and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory, and indubitable proof—First—of the contract, and of its terms. Such proof must be clear, definite, and conclusive, and must show a contract leaving no *jus deliberandi,* or *locus penitentiae.* It cannot be made out by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject matter, which may have been imperfectly heard, or inaccurately remembered, perverted, or altogether fabricated; testimony therefore impossible to be contradicted."

II.

There Was No Proof of Any Facts Sufficient to Take the Asserted Oral Contract Out of the Statute of Frauds.

This point was presented in Appellant's Opening Brief, pages 19 to 30. It is discussed in Appellee's Brief at pages 26-36. Most of the cases cited and points made by appellant are completely ignored by appellee.

Appellee argues by way of confession and avoidance that the trial court's findings with respect to the Statute of Frauds are not reviewable in the absence of an abuse of discretion (p. 26).

Such a contention amounts to a claim that the courts are not bound by the Statute of Frauds. This is not the law.

As stated in *Hambey v. Wise,* 181 Cal. 286, 289:

> ". . . it is not to be forgotten that *equity is after all bound by the Statute of Frauds* and that, in general, relief is given against the statute only in two classes of cases, first, where to allow the statute to be set up would be to secure to the party relying upon it the fruits of actual fraud, and second, where to allow the statute to be set up would place the party resisting in an inequitable position, it appearing further that there is evidence just as good as a writing of the agreement between the parties."

Fraud is "requisite to an estoppel."

> *Zellner v. Wassman,* 184 Cal. 80, 87.

This was also held to be the law in *Schick Service Co. v. Jones* (C. C. A. 9), 173 F. 2d 969, relied upon by

appellee (p. 26), where the plaintiff had suffered substantial loss in relying upon the oral agreement,

> "thereby changing his position to his detriment, since he could not be returned to a position of non-disclosure,"

there was no basis for an equitable estoppel (p. 977). The reference to the trial court's discretion can have no further significance than the actual holding in that case, and cannot be distorted into a statement of a universally applicable principle contrary to all prior decisions.

What the trial court there had held was that despite the various elements of damage sustained by plaintiff in reliance upon the alleged contract, no fraud had been shown sufficient to prevent the application of the statute. A holding denying equitable relief where the facts of damage and fraud are shown in the evidence—in the exercise of the court's discretion—is *not* a holding that the court has discretion to abrogate the statute where such facts of damage and fraud do not appear. The elements of equitable estoppel must exist *before any occasion arises for the exercise of discretion.* These elements are clearly defined in the decisions of this court, and even in the case relied upon by appellee, *Seymour v. Oelrichs,* 156 Cal. 782.

A trial court can no more ignore these decisions than any other binding precedents. It is not within his discretion either to amend the Statute of Frauds, to nullify it, or to negate it by enforcing illegal oral contracts in violation of established legal principles.

In matters where the trial court does have the right or duty to exercise discretion it

> "is not a capricious or arbitrary discretion, but an impartial discretion guided and controlled in its exercise by fixed legal principles."

Here the court refused to consider the defense Statute of Frauds, frankly stating that if he found there was an oral agreement, he would hold the defendant bound. Realizing that he was ruling directly contrary to the decision of this court in *Wood v. Moore,* 97 F. 2d 920, he stated:

> "The Court: With all due respect to my superior Judge Stephens, *I do not think that is the law. I think that goes too far."*

The trial court himself did not consider that he was exercising discretion, saying:

> "If I am wrong on the law, you have your remedy of appeal. It is *a lot easier to appeal on questions of law* than it is on questions of fact. *I have ruled against you on your view of the law;* therefore it is an easier kind of appeal to take." [R. 128.]

Appellee emphasizes that appellant's officer Miller admits that he instructed Swanson to send him the cattle (p. 27). This is not true. This ignores the evidence of Swanson himself that Miller advised him to "try to sell them up there if you can" [Tr. 75]. This is also admittedly what appellee and Swanson did try to do.

In any event there was no acceptance of the cattle by appellant and the court so finds [Findings XVII and XVIII, R. 13-14].

Appellee asserts that the facts of *Platt v. Union Packing Co.,* 32 Cal. App. 2d 329, are identical (p. 27). Actu-

ally there is no similarity. There appellant officer's minor son with the assistance of King, a commission merchant, purchased certain cattle which were delivered, accepted, and paid for by appellant. The seller then successfully contended that the acceptance of these shipments operated to relieve from the Statute his asserted oral contract with the minor son and King for the purchase of a larger number of cattle still remaining on his ranch. No question of estoppel was involved.

In *Rutland, Edwards & Co. v. Cooke,* 44 Cal. App. 2d 258 (Appellee's Brief, p. 28), the defendant after his stockbroker notified him of a purchase and of an opportunity to resell, ordered the stockbroker to hold for a higher price. Defendant thus "assented to becoming the owner" under Civil Code, Section 1624A.

In *Flint v. Giguiere,* 50 Cal. App. 314, 320 (Appellee's Brief, p. 29), the defendant had "fully received the benefits of the transaction." The same is true of the case of *Tobola v. Wholey,* 74 Cal. App. 2d 351, 357 (Appellee's Brief, p. 30).

In *Fidelity Surety Co. v. Millspaugh and Irish Corp.,* 14 F. 2d 937, 939 (Appellee's Brief, p. 31), the surety company's obligation was in writing and it was contended that any extensions of the indebtedness guaranteed should also be in writing. But the court holds that the extensions having been requested by and given "for the benefit of the surety company," it was not thereby released from liability.

In *Le Blond v. Wolfe,* 83 Cal. App. 2d 282, 284 (Appellee's Brief, pp. 32-33), plaintiff was a real estate broker who negotiated a sale of certain property to defendant Bisno. Defendant "asked plaintiff to release the owners—from their obligation to pay him a commission

and to obtain from them a net price exclusive of any commission to plaintiff and that if plaintiff did so, he (Bisno) would pay plaintiff $2500 for his services. Pursuant to Bisno's request and in reliance upon his oral promise to pay him $2500, plaintiff released the owners from any obligation to pay him a commission and obtained a net offer to sell to Bisno for the previous asking price exclusive of any commission to plaintiff" (p. 284).

In *Seymour v. Oelrichs,* 156 Cal. 782, 793 (appellee's brief, pp. 33-34) there was a definite promise to enter into a written contract (*E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.,* 97 F. 2d 402, 409), and the court further held that acts of part performance such as are relied upon by plaintiff are not sufficient, saying:

> "The claim of plaintiff is not that mere part performance of a contract for personal services which by its terms is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. *Such a claim would, of course, find no support in the authorities.* . . . It was the change of position caused by his resignation from the Police Department upon which his claim wholly rests, and this resignation was, of course, no part of the performance of the contract of service. . . ." (Emphasis added, pp. 793-4.)

No other cases are relied upon by appellee.

Appellee does not in any wise attempt to support the trial Court's holding that the decision of this court in *E. K. Wood Lumber Co. v. Moore Mill and Lumber Co.,* 97 F. 2d 402, 409, is "not the law." or "goes too far." [R. 122.]

This case is discussed by appellee at pages 35-36 but nothing is said to justify or excuse the trial court's strictures.

Appellee also refers to this court's decision in *Georgia Peanut Co. v. Famo Products Co.,* 96 F. 2d 440, as requiring the seller to show *"some affirmative act"* on which he relied, and to the decision of this court in *Cincinnati Distributing Co. v. Sherwood & Sherwood Co.* (C. C. A. 9), 270 Fed. 82, which would require a plaintiff to show conduct of defendant, relying upon the statute, "such as to raise an equity *outside of and independent of the contract."* But appellee makes no effort whatsoever to show that these requirements have been met in this case (p. 36).

No other cases are cited or discussed by appellee. The brief completely disregards the cases cited and discussed in appellant's brief, pages 24-30.

No reference is made to the case of *Booth v. A. Levy and J. Zentner Co.,* 21 Cal. App. 427, 431, which covers this case like a blanket. There the seller paid freight charges and when the buyer rejected, resold at a loss. (Appellant's Brief, p. 29.)

The court held the defendant was "not estopped to rely upon the Statute of Frauds," saying:

> "It is a plain case where the seller chose to ship goods to a distant buyer who was bound by an oral agreement only. To hold that under such circumstances the buyer who refuses to accept the goods is estopped to rely upon the statute *would be to practically abrogate the Statute of Frauds."* (Emphasis added.)

Here the freight and custom paid were necessary prerequisites to sale in any large American market. The price was correspondingly increased, in the absence of special circumstances not claimed to exist. Plaintiff sustained no loss by reason of expense of delivering to a metropolitan

market, which he would not have sustained in any event. This expense was no more of a loss or detriment than feeding or any other cost of preparing for market.

Attempts were made to sell these very cattle in Canada without success. It was deemed necessary to sell them in the United States and to incur the freight and customs duty incident thereto. Such expenses cannot be presumed to constitute actual loss, and there is no proof that they did. If appellee had accepted the cattle under the asserted contract, plaintiff would have incurred the identical expenditures. Therefore plaintiff's damage under the contract asserted, does not include these items but is limited to the difference between the market price and the asserted contract price.

It is significant that in the present case there is no finding of an oral contract which pre-existed this asserted performance by plaintiff. The complaint alleged such an oral contract but this contention was rejected by the Trial Court, who found only a continuing offer. This continuing offer was not taken out of the statute by plaintiff's performance, as was contended in the cases cited by plaintiff. There must first be an oral contract to take out of the statute. Here there was found to be none prior to performance. Therefore, it is the performance which appellee must contend both gives rise to the contract and takes that contract out of the statute. No case has been cited to support such contention. The contention cannot be reconciled with any cited in either brief.

If the holding of the Trial Court is permitted to stand nothing will be left of the Statute of Frauds. A seller will not even have to show an agreement on his part. There need be no agreement which the buyer himself could ever enforce. The seller merely ships to a particular con-

signee and that alone will nullify any contract which the seller wants to assert this consignee "offered" to enter into. The seller need show no contract, no writing, and no commitment on his part. He reserves a floating option to deliver or not to deliver. Of course, if the market drops, he delivers. In the meantime the buyer is powerless to protect himself, because he does not even know a contract or "continuing offer" will be asserted.

Certainly it was to preclude such enormous hazard to commercial life that the Statute of Frauds was enacted and perpetuated throughout our jurisdiction.

It is respectfully submitted that appellee has shown none of the elements essential to be shown to avoid the statute and that none exist. Also the record clearly shows that no judicial consideration was given to the legal principles applicable.

It is respectfully submitted that the judgment herein should be reversed.

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